

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JUMAH ABDULLAH THOMAS  
MOORE ALI,

Plaintiff,

No. CIV S-02-0937 MCE KJM P

vs.

COUNTY OF SACRAMENTO, et al.,

ORDER AND

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. Defendants are the County of Sacramento (County) and current and former employees of the County. Several matters are before the court.

1. June 15, 2007 Order To Show Cause

On June 15, 2007 the court ordered counsel for defendants to show cause why sanctions in the amount of \$100 should not be imposed, for counsel's raising objections for the first time on a motion for reconsideration. Counsel has not shown that sanctions should not be imposed, but rather has conceded that the objections were not raised in a timely fashion or as otherwise provided by local rule. Therefore, for reasons identified in the court's June 15, 2007 order to show cause, and under Federal Rule of Civil Procedure 11 and Local Rule 11-110,

1 counsel for defendants will be ordered to pay \$100 in sanctions to the Clerk of the Court within  
2 ten days of this order.

3 2. “Three Strikes”

4 On July 17, 2007, defendants filed a motion asking that this matter be dismissed  
5 pursuant to 28 U.S.C. § 1915(g). Title 28 U.S.C. § 1915 dictates when the court may allow  
6 litigants to proceed in forma pauperis. Title 28 U.S.C. § 1915(g) reads as follows:

7 In no event shall a prisoner bring a civil action or appeal a judgment  
8 in a civil action or proceeding under this section if the prisoner has,  
9 on 3 or more prior occasions, while incarcerated or detained in any  
10 facility, brought an action or appeal in a court of the United States  
that was dismissed on the grounds that it is frivolous, malicious, or  
fails to state a claim upon which relief can be granted, unless the  
prisoner is under imminent danger of physical injury.

11 This action was filed by plaintiff on May 1, 2002. His request to proceed in forma pauperis was  
12 granted on July 12, 2002.

13 Defendants’ counsel points to several cases in an attempt to show that plaintiff is  
14 barred from proceeding in this action in forma pauperis. In most of the cases cited by defendants,  
15 judgment was entered after this case was filed. Because a finding in those cases that the action  
16 brought was either frivolous, malicious or failed to state a claim upon which relief can be granted  
17 did not occur prior to plaintiff bringing this action, those findings cannot count as “strikes” under  
18 § 1915(g). The only “strike” identified by defendants is CIV-S-01-2003 GEB DAD P. That case  
19 was dismissed for failure to state a claim on December 20, 2001. Decl. of Jeri Pappone, Ex. B at  
20 1-8. Because there is no other evidence of § 1915(g) “strikes” in the court’s record, the court will  
21 recommend that defendants’ motion to dismiss based on 28 U.S.C. § 1915(g) be denied.

22 3. Defendants’ July 30, 2007 Motion For Summary Judgment

23 This action is proceeding on plaintiff’s second amended complaint filed May 22,  
24 2002. In his second amended complaint, plaintiff alleges that between January 29, 1999 and May  
25 2, 2001, defendants failed to make certain accommodations to allow plaintiff to practice Islam  
26 while incarcerated by Sacramento County. Plaintiff also takes issue with the fact that he had

1 been transferred between Sacramento County's jails several times during that period of time.  
2 Finally, he alleges he was retaliated against for filing prisoner grievances. Based upon these facts  
3 plaintiff alleges defendants have violated his rights arising under the Free Exercise Clause of the  
4 First Amendment, the Freedom of Speech Clause of the First Amendment and the Eighth  
5 Amendment. Second Am. Compl. at 16.

6 In their motion for summary judgment, defendants argue, among other things, that  
7 plaintiff has not exhausted administrative remedies with respect to any of his claims. According  
8 to the Ninth Circuit Court of Appeals, a finding that an inmate-plaintiff has failed to exhaust  
9 administrative remedies is not a judgment on the merits of his claims. Wyatt v. Terhune, 315  
10 F.3d 1108, 1119 (9th Cir. 2003). Therefore, a court should not grant summary judgment after  
11 such a finding. Id. Instead, courts should dismiss the plaintiff's claims without prejudice. Id. at  
12 1120.

13 The court's authority to dismiss a complaint where a plaintiff has failed to exhaust  
14 administrative remedies arises under Rule 12(b) of the Federal Rules of Civil Procedure. Id. at  
15 1119. In deciding a motion to dismiss for failure to exhaust non-judicial remedies, the court may  
16 look beyond the pleadings and decide disputed issues of fact. Id. at 1120.

17 The exhaustion requirement is rooted in the Prison Litigation Reform Act, which  
18 provides that "[n]o action shall be brought with respect to prison conditions under section 1983  
19 of this title, . . . until such administrative remedies as are available are exhausted." 42 U.S.C.  
20 § 1997e(a). Failure to exhaust is an affirmative defense that the defendants have the burden of  
21 proving. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.), cert. denied sub nom. Alameida v.  
22 Wyatt, 540 U. S. 810 (2003).

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1 The grievance process in the Sacramento County jails consists, in relevant part, of  
2 the following steps:

- 3 1. The inmate directs his problem to the appropriate "Housing  
4 Unit Officer."
- 5 2. If the Housing Unit Officer cannot or does not resolve the  
6 problem, the inmate can file a formal grievance with any jail  
7 deputy within five days of the incident grieved.
- 8 3. An inmate can appeal the decision rendered on his grievance,  
9 within five days of receipt of the decision, to the Main Jail  
10 Commander.

11 Decl. of C. Scott Harris, Jr. at ¶ 11, Exs. B & F.

12 Defendants present evidence indicating that plaintiff never submitted any appeals  
13 to the Sacramento County Main Jail Commander regarding anything at issue in this action. Decl.  
14 of Jerri Pappone ¶ 6 & Ex. C. Therefore, defendants argue plaintiff has not exhausted  
15 administrative remedies available to him in the Sacramento County jails.

16 Plaintiff argues in opposition to defendants' assertion that he did exhaust  
17 administrative remedies by filing a "county tort claim." See Opp'n at 13:12-19 & Second Am.  
18 Compl. ¶ 123. However, nothing before the court suggests that filing a "county tort claim"  
19 exhausts the administrative procedures described above.

20 Plaintiff also asserts "[t]his court has recently ruled against the defendants'  
21 motion to dismiss and found that the plaintiff satisfied the requirement of exhaustion of  
22 administrative remedies . . ." Opp'n at 13:15-17. This characterization of the court's prior  
23 determination is incorrect. In findings and recommendations concerning a motion to dismiss  
24 brought by defendants, the court found as follows:

25 In their Reply to plaintiff's Opposition to Defendants' Motion to  
26 Dismiss, defendants claim this action should be dismissed because  
plaintiff failed to exhaust the inmate grievance process before  
bringing this action. It is generally not appropriate to raise new  
arguments in a reply brief as the opposing party does not have an  
opportunity to respond. In any case, even if the court were to reach  
defendants' exhaustion argument, plaintiff's claims are against

1 county, not CDC officials, making the grievance process  
2 prescribed by Cal. Code Regs. tit. 15, § 3084.1, et seq.  
3 inapplicable. Reply at 4. Even if the County makes available  
4 administrative remedies it believes plaintiff should have exhausted  
under 42 U.S.C. § 1997e, defendants have not met their burden of  
demonstrating failure to exhaust. Wyatt v. Terhune, 315 F.3d  
1108, 1119 (9th Cir. 2003).

5 Findings and Recommendations filed Aug. 13, 2003; see also Order filed Sept. 18, 2003  
6 (adopting Findings and Recommendations in full). In other words, the court did not reach  
7 defendants' failure to exhaust argument because it was not properly raised and found, in any  
8 event, that the evidence before the court was not sufficient to establish failure to exhaust. The  
9 court never asserted or implied that plaintiff has in fact satisfied the exhaustion requirement.

10 The court notes that when this action was filed on May 1, 2002, plaintiff resided  
11 in the California Department of Corrections and Rehabilitation (CDCR). Second Am Compl.  
12 ¶ 117. While it is not entirely clear, the court assumes that when plaintiff entered CDCR  
13 custody, he could no longer file grievances with Sacramento County. Therefore, literally  
14 speaking, administrative remedies were no longer available to plaintiff concerning his claims  
15 when he filed this action. However, even if plaintiff could no longer submit a grievance to  
16 Sacramento County Jail officials when this action was filed, plaintiff's claims cannot survive.  
17 For an inmate to have "properly" exhausted administrative remedies he must comply with the  
18 applicable detention facility's deadlines and other critical procedural rules. Woodford v.  
19 Ngo, 126 S. Ct. 2378, 2386-87 (2006); 42 U.S.C. § 1997e(a) (requiring "proper" exhaustion). At  
20 least some of plaintiff's complaints date back to early 1999, after which he would have had time  
21 to comply with the Sacramento County Sheriff's deadlines regarding the filing of grievances or  
22 appeals of those grievances. He did not.

23 In light of the foregoing, the court finds that plaintiff has not exhausted available  
24 administrative remedies with respect to any of his claims as required by 42 U.S.C. § 1997e(a).  
25 Therefore, his second amended complaint should be dismissed without prejudice and the court  
26 need not reach the other arguments in defendants' motion for summary judgment.

1 4. Request For Judicial Notice

2 With their motion for summary judgment, defendants filed a request that the court  
3 take judicial notice of plaintiff's second amended complaint and a copy of a New York Supreme  
4 Court case. Although documents can be used to establish facts, the court may take judicial notice  
5 only of facts, not documents. Fed. R. Evid. 201. In any event, the court can and has considered  
6 the complaint and the case provided, giving both appropriate weight. Defendants' request will be  
7 denied.

8 5. Plaintiff's September 24, 2007 Motion For Injunction

9 Plaintiff has filed a motion asking that the court order counsel for defendants to  
10 return to plaintiff all copies of medical records in their possession that pertain to this action,  
11 that the court refrain from considering and disclosing all of plaintiff's medical records submitted  
12 by defendants in support of their motion for summary judgment, and further that the court order  
13 defendants to pay plaintiff \$250,000 for illegally obtaining and releasing plaintiff's medical  
14 records. With respect to his request for return of his records and his request for money damages,  
15 plaintiff's recourse is to file a separate lawsuit because his claims in this respect are not covered  
16 by the pending causes of action. With respect to his request that the court not consider or  
17 disclose the records in any respect, the court has not considered any medical records submitted by  
18 defendants in determining that this matter should be dismissed for failure to exhaust  
19 administrative remedies. Moreover, defendants correctly observe that plaintiff has filed his own  
20 medical records with the court in support of some of his motions, with the result that he has  
21 waived a claim of privacy with respect to those documents at least. See, e.g., Docket No. 127  
22 (Opp'n to Summ. J. & Exs.). Because plaintiff has not identified a set of records implicating his  
23 privacy concerns that only defendants have filed, the court is not able to determine whether his  
24 waiver extends to the particular documents covered by his request for injunctive relief.  
25 Therefore, the court will recommend that plaintiff's September 24, 2007 request for an injunction

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1 be denied without prejudice to identification of specific documents that plaintiff in good faith  
2 believes should be sealed. See Local Rules 39-140, 39-141.

3 6. Plaintiff's Motions For Appointment of Counsel

4 Plaintiff has requested the appointment of counsel. The United States Supreme  
5 Court has ruled that district courts lack authority to require counsel to represent indigent  
6 prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In  
7 certain exceptional circumstances, the court may request the voluntary assistance of counsel  
8 pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);  
9 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In the present case, the court  
10 does not find the required exceptional circumstances. Plaintiff's request for the appointment of  
11 counsel will therefore be denied.

12 In accordance with the above, IT IS HEREBY ORDERED that:

13 1. Counsel for defendants shall pay \$100 in sanctions to the Clerk of the Court  
14 within ten days of this order.

15 2. Plaintiff's motions for the appointment of counsel (#185 & #196) are denied.

16 3. Defendants' July 30, 2007 request for judicial notice (docket no. 164-3) is  
17 denied.

18 IT IS HEREBY RECOMMENDED that:

19 1. Defendants' motion to dismiss (#162) be denied;

20 2. Plaintiff's request for an injunction (#182) be denied;

21 3. Defendants' "motion for summary judgment" (#164) be granted; and

22 4. This case be dismissed without prejudice for failure to exhaust administrative  
23 remedies.

24 These findings and recommendations are submitted to the United States District  
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
26 days after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned  
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
3 shall be served and filed within ten days after service of the objections. The parties are advised  
4 that failure to file objections within the specified time may waive the right to appeal the District  
5 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 DATED: February 14, 2008.

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10 U.S. MAGISTRATE JUDGE  
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